VIRGINIA LAW REGISTER

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All Communications should be addressed to the PUBLISHERS

Meeting of the State Bar Association.

The annual meeting of the Virginia State Bar Association will be held at Richmond, May 11th, 12th and 13th. The Jefferson Hotel will be headquarters and all meetings will be held there.

All standing committees are requested to meet at the Secretary's office on the lobby floor on the evening of May 10th at 8 P. M.

On May 11th at 11 A. M., address by the President, Hon. Randolph Harrison, of Lynchburg, and reports of committees. That afternoon about 6 P. M. the City Bar Association will give an automobile ride to the out-of-town members and their ladies, followed by a reception at the Country Club of Virginia to the State Association.

On May 12th at 10:30 A. M. will be held a business session and the election of officers for the ensuing year. That evening at 8:30 there will be an address by Senator Atlee Pomerene, of Ohio, followed by unfinished business.

On May 13th at 11 A. M., annual address by Vice-President Thomas R. Marshall, followed at 8 P. M. by the annual dinner.

Other attractive features of the program will be announced later.

The rates at the Jefferson on the European plan, good from May 9th to 15th, will be $2.00 and $2.50 per day for single rooms without bath, and $4.00 and $5.00 per day for double room without bath, according to location. With bath, single rooms $3.00 and $3.50; double rooms, $5.00 to $7.00, according to location.

Last year 187 members registered with the Secretary. In view of the attractive program and the delightful experience of all who attended the meeting in Richmond last year it is to be expected that there will be a much larger attendance in 1920 than there was in 1919. The hospitality of the Richmond Bar As-

sociation was worthy of the best traditions of the Old Dominion, and the experiment of having the Bar Association meet in the Capitol City proved in every way a success.

124th Virginia.

Through the courtesy of the Michie Company we have been supplied with the 124th Volume of *Virginia State Reports*. Sixty-six cases are reported in this volume, of which thirty-three were affirmed, twenty-seven reversed, two affirmed in part, two reversed in part, one amended, and one dismissed. There were nine criminal cases—one affirmed, six reversed and petition dismissed in two. Every case in this volume has of course been alluded to or reported in full in the REGISTER, at one time or another. We are very much struck with the excellent brevity of so many of the opinions. None of them are prolix and it is the evident tendency of the court to say as much as possible in few words. Of course some of the opinions necessarily have to be long. We think some of them might be shortened by stating the substance of the evidence given instead of putting out the questions and answers in depositions in full. The index to the present volume is most admirable, and the laborious work seems to us to be excellently done.

Amendments to the Code.

As might be expected, this being the first session of the Virginia Legislature, after the revisal of the Code, a large number of amendments were passed. We shall give a brief reference to each one as fast as the advanced sheets reach us. Up to the time of our going to print the following sections have been amended:

Page 3, sections 5986 to 5990 in regard to the appointment of jury commissioners has been put back to the law as it stood in the Code, the Act of March 16th, 1918, having been repealed.

Page 5, section 5888 in regard to judicial circuits.

Page 8, section 5893, in regard to the commencement and number of the terms of courts.

Page 9, sections 42 and 1402 in regard to suits by and against trustees. Page 9, section 59, in regard to secretaries.

Page 11, section 1639, in regard to the practice of optometry. Page 11, section 122, in regard to filling vacancies in certain offices. Page 11, section 2094, in regard to jail prisoners.

Page 18, section 2449, as to the apportionment of taxes, levies or assessments, state, county or municipal.

Page 19, section 2466 and section 3009, repealed. Page 19, section 3852, providing for the forfeiture of the privileges and immunities granted under a charter in case of alteration, etc., of said charter.

Page 20, section 3897, as to debts and claims against corporations when sold. Page 20, section 3935, as to contracts of surety between common carriers and their employees and sureties upon such contracts.

Page 21, section 4125, as to deposits of deceased persons, etc., in banks.

Page 22, section 4180, in regard to companies insolvent by violating the law.

Page 23, section 4354, as to taxes upon associations or joint stock companies embraced in section 4351.

Page 24, section 4813, as to warrant of arrest by coroner. Page 24, section 4895, as to venire in case of felony.

Page 26, amending sections 5388, and 5389 as to suits on bonds of personal representatives, etc. Page 26, section 5787, in regard to suits of personal representatives of deceased persons, award of damages, new trials, etc.

Page 27, amending section 5790 as to when the right ot action is not to determine or when brought to date under section just mentioned or under section 5786.

Page 28, section 6105, how and when exception to jurisdiction to be taken, etc. Same page, section 6441, repealed.

Page 34, section 2244, as to duties of assessors.

Page 36, amending section 2233 in regard to appointment of assessors.

Page 57, section 882, in regard to registration of persons disposing of nurseries stock.

Page 58, amending section 719 as to who admitted to public schools, etc.

Page 59, amending and re-enacting section 5276. This amendment is of so much importance that we think it well enough to set it out a little more fully than merely to refer to it. The section is as follows:

> Sec. 5276. When and how benefits of will may be renounced and the effect thereof. When any provisions for a husband or a wife is made in the consort's will, the survivor may within one year from the time of the admission of the will to probate, renounce such provision. Such renunciation shall be made either in person before the court in which the will is recorded, or by writing recorded in such court, or the clerk's office thereof, upon such acknowledgment of proof as would authorize a writing to be admitted to record under chapter two hundred and eleven. If such renunciation is made, or if no provision for the surviving husband or wife be made in the will of the decedent, the surviving consort shall, if the decedent left surviving issue of the marriage which was dissolved by the death of the consort, or surviving issue of a former marriage, have one-third of the surplus of the decedent's personal estate mentioned in section fifty-two hundred and seventy-three; or if no such issue survive, the surviving consort shall have one-half of the aforesaid surplus; otherwise the surviving consort shall have no more surplus than is given him or her by the will.

This act, we may say, received the endorsement of the revisors, and whilst this seems to be somewhat of an innovation in Virginia, it strikes us as being absolutely just. Where a man has no children of course he should have the right to say what should be done with his property, subject of course to the rights of his wife, and as the wife has the right since the Code of 1887, it is certainly just that the husband should have a similar right.

Page 59, amending section 703 and repealing 704 to 718, inclusive, of the Code of Virginia in regard to high schools.

Page 61, in regard to the audit by the State Board of Education of all claims paid out of the literary fund.

Page 66, amending section 3408 to allow women to obtain license to practice law. Section 2551, requiring clerks to report to the courts a list of fines reported by justice of the peace, and requiring the court to examine the list and enter of record that they had been returned, etc.

Page 68, section 2250, as to compensation of assessors.

Page 69, amending section 669 in regard to the payment of State funds for school purposes.

Page 70, amending section 786 in regard to school trustees.

Page 72, amending section 63 and 64 in regard to census of school population.

Page 74, repealing sections 693 and 722. Same page, amending section 741, permitting board of supervisors to make certain appropriations to public schools.

Page 75, amending Act 5995 in regard to qualification of persons to serve as jurors more than one term.

Page 77, amending section 5917 as to executing process, etc., in the husting courts of Richmond.

Page 81, an act amending section 291 of the Code of Virginia in regard to qualification of persons acting as justices of peace, members of various boards, etc.

Page 85, section 3435, fixing salary of auditor.

On page 87 is an important act amending the Code in regard to the running of the statute of limitations in creditors' suits, which we may allude to in a subsequent number. On same page, amending section 1486 in regard to State board of health.

Page 89, amending section 2274 in regard to clerk making an annual list of fees.

Page 95, an act amending sections 2332 to 2336, inclusive, relative to the assessment and collection of omitted taxes and levies.

Page 97, section 2773, in regard to the salary of the clerk of board of supervisors.

Page 99, amending section 4775, providing that if an act be a violation of two or more statutes or two or more municipal ordinances, or if the same act be a violation of both State and federal statute a conviction under one of said acts shall bar any further proceeding in the State. Same page, section 3775, in regard to relief of corporations from excessive or erroneous taxation.

Page 105, section 3394, in regard to general indexes for clerk's offices.

Page 107, amending sections 110, 111, 112, 113 and 119, and repealing sections 1116, 1126, 1127, 1128, 1129, 1130, and 1131 in regard to registration of fertilizers.

Page 118, amending section 2421 requiring the judge of each circuit and corporation court to appoint a delinquent capitation tax collector.

Page 210, an act to amend section 2958 in regard to annexation of territories by cities or towns.

Page 216, amending section 2726, providing temporary offices, insuring buildings and fixing allowances and offices of counties and cities.

Judge Lunsford Lomax Lewis.

After an illness of many weeks Judge Lunsford Lomax Lewis, President of our Supreme Court of Appeals from January 1883 to January 1895, died at his home in Richmond on the 13th day of March, 1920.

Judge Lewis was a lineal descendant of John Lewis, of a French Huguenot family that left France to avoid religious persecution during the reign of Louis XIV, the exiles taking refuge in Ireland. He came to America about 1730, first settling in Pennsylvania and then coming to Augusta County, Virginia, in 1732. He was the pioneer settler of the county and the justice of its first court. The bronze statue of one of John Lewis's sons, Andrew Lewis, a great uncle of Judge Lewis, forms one of the group surrounding the Washington Monument in Richmond.

Judge Lewis's father was Samuel Hance Lewis, a great grandson of John Lewis. He was at one time a member of the Virginia Assembly; for many years the presiding justice of the Rockingham County Court, and general of the State militia. Judge Lewis's mother was Anna Maria Lomax, the daughter of Judge John Taylor Lomax, distinguished jurist and text writer.

Judge Lewis was born at Lewiston, Rockingham County, Virginia, on the 17th day of March, 1846, and was, consequently, at the time of his death, seventy-four years of age. His boyhood and early manhood were spent in the lovely Valley of Virginia, where so many great and true men have been born and reared.

He was educated at Center College, Kentucky, and at the University of Virginia, where he graduated as Bachelor of Law in 1867, and shortly after was admitted to the Bar. He located in Culpeper County and quite soon thereafter was designated

by the United States Government as Attorney for the Commonwealth under the Reconstruction period to represent several counties in the northern part of the State, embracing Culpeper, Fauquier and others. Virginia having been restored to the Union, Judge Lewis was appointed at the early age of twenty-seven years as United States Attorney for the Eastern District of Virginia, which office he held until 1882. That year Judge Lewis was elected by the General Assembly as a member of the Supreme Court of Appeals of Virginia for the full term. The venerable President of the Court, Judge R. C. L. Moncure, having died before the new Court went into office, Governor Cameron, on August 28th, 1882, appointed Judge Lewis to the vacancy. He served during a part of the last year of the old court, composed of Judges Waller R. Staples, Joseph Christian, Francis T. Anderson, and Edward C. Burke, and whilst a member of that court he wrote and delivered eight opinions, the first being *Boyce* vs. *McCaw,* 76 Va. 740, involving the question of an attachment in equity.

Upon the meeting of the new court at the January Term, 1883, Judge Lewis was elected President of the court and presided during the whole term for which that court was elected. During the year of his service as President of the court 1446 cases were decided, beginning with 77th Virginia and closing with 90th Virginia. Of these Judge Lewis wrote and delivered the opinion in 407 cases, and in addition wrote a good many dissenting opinions. His opinions are concise, clearly expressed, logical and able. They abound in pertinent authority and are remarkably convincing. The only fault which the bar found with Judge Lewis was that his mind ran too much towards the Federal construction of the Constitution and that the bent of his disposition was to put the Supreme Court of the United States decisions as ruling the Virginia law even in local matters, but that was the natural result of Judge Lewis's training, and the strong Federalist leaning which he and his family had always evinced.

On leaving the bench Judge Lewis resumed the practice of law in Richmond and soon became a prominent and widely known practitioner, winning the confidence of his clients and the respect of the courts. In December 1902 he was again appointed

United States Attorney for the Eastern District of Virginia, an office he resigned to make the fight for the Governorship, but was reappointed in 1910, resigning the office in 1912.

Judge Lewis was twice married, his first wife being a daughter of the late Honorable John Minor Botts, by whom he had three children, two of whom survived him—J. B. M. Lewis of Lynchburg, and S. H. Lewis of Richmond. His only daughter, Miss Mary W. Lewis, died several years ago.

Judge Lewis married a second time Miss Janie Looney, of Memphis, Tennessee.

In public life Judge Lewis was a conspicuous and leading figure. In private life he was a genial, upright and lovable character, a cultured, unassuming, high-minded Virginian, who was respected, admired and loved by all who knew him. He was a member of the Phi Beta Kappa Fraternity, was President of the Virginia State Bar Association, Vice-President of American Bar Association, President Virginia Society Sons of American Revolution, and a member of Grace Episcopal Church, Richmond, Va.

Can Intention Make the Law?

Our Court of Appeals in the case of *Poole* vs. *Perkins* alluded to in our editorial in the April Number, stated that the matter was one of a great deal of difficulty, and the more we examine the case the more are we convinced that the Court was entirely right. We came to the conclusion that the case was rightly decided, and the Supreme Court of the United States has practically taken the same view that our court has taken. And yet in reading the case over in connection with Professor Raleigh C. Minor's book it seems to us that as of course a purely academic question the matter deserves some argument. In justice to Professor Raleigh C. Minor we think it well to make some further quotations from his book because it seems to us that the court has not fully quoted some of his reasons for the view he takes. For instance the court says: "The adoption of the intention of the parties to the contract . . . . . is consistent with the reason which Professor

Raleigh C. Minor assigns for the opinion that the proper law is the law of the place where the contract is actually signed," etc. Professor Raleigh Minor did not use the language in the citation made from his book that the contract was "actually signed." The words he used were the contract "made" or "entered into," which need not necessarily be the place where the contract is signed; and the court itself admits this in that paragraph of the opinion beginning "It will be found, too, from an examination of the authorities last above cited, to which many others of like tenor and effect might be added, that most of them concede that the actual bodily presence of the contracting party is not necessary to make the contract valid according to the laws of some other state than that of the domicile."

Then follows a quotation from Professor Raleigh C. Minor's book, which the Court claims is consistent with the idea that the intention of the parties is the true criterion. It may be observed that the quotation bases the paramount authority of the law of the place where the contract is made not upon the intention of the parties, but upon the *sovereignty of that state* over all acts done there. But on page 364 of Professor Raleigh C. Minor's book occurs a paragraph to which the court does not refer, in which it is laid down as axiomatic that the intention of the parties in a purely domestic contract cannot make valid a contract that the domestic law declares shall be void.

"Thus a Virginia married woman contracting in Virginia, whose law prohibits her to make a particular contract, will not be held liable in Virginia upon such a contract merely because she intended to enter into a valid contract."

According to the court's view all the married women would have to do in such case to make the Virginia contract valid, though declared void by Virginia law, would be for her to say in her contract that she wants the law of Mexico or Venezuela to govern it, and that though the contract was also to be performed in Virginia; for the court says the place of performance shall govern merely because that is the law *intended* by the parties, and if the parties show their intention to have not the law of the place of making or performance but the law of some third state like Mexico, supra, govern then according to the court that would be the controlling law.

So that we would have a married woman doing in Virginia the very thing (that is, making the contract) which the Virginia law says she shall not do, and setting that law completely at defiance, merely by saying in her contract that she does not intend the Virginia law to govern the act done on Virginia soil.

One might well ask who is sovereign over Virginia territory anyway, the married woman or the State of Virginia? The court seems to think the married woman is. In these parlous times the court may after all be right though it was anciently thought otherwise. It is an exceedingly convenient doctrine for the bootlegger you might prosecute for selling liquor illegally. If he is wise enough when he sells the liquor to provide that he intends the contract of sale to be governed by the law of England, by which the sale of, or contract to sell, liquor is perfectly legal, then he cannot be prosecuted for a legal act.

This would seem to be clearly the logical (however absurd) result of the court's reasoning. For the position could be safely taken that the married woman or the bootlegger can make his contract perfectly good by going to Mexico or to England, submitting herself or himself to the sovereignty of those states, respectively, and making the contract there, but they cannot do so by staying in Virginia and making the contract on her soil when the law of Virginia says they shall not do those things on her soil, and then claim the transactions valid merely because it is their sovereign will that the law of Mexico or England shall operate on this transaction in Virginia territory. It is Virginia's sovereign will that is to be looked to, not that of the married woman or the bootlegger, so far as concerns acts done in Virginia territory.

The court makes light of the operation of the sovereignty of Tennessee over the act taking place there, the making of the contract, because the married woman by stepping across the state line into Virginia could easily have made a valid contract. But she did not step over into Virginia, and she did in Tennessee, the very act which the Tennessee law said she could not do in Tennessee—made the contract.

The Virginia law says in effect that a contract made by a married woman in Virginia shall be valid or that a married woman

may validly make a contract in Virginia. It does not mean to say (because the Virginia legislature has no authority to say) that a married woman can validly make a contract in Tennessee. It is for the Tennessee legislature to say what a married woman can or cannot validly do in Tennessee. If the act to be done in *performance* of the contract is to be done in Virginia, it is up to Virginia to say whether that act of *performance* is or is not a legal act, but Virginia law has nothing to do with the making in Tennessee, the legality of which is dependent on the law that has sovereign control over all acts done in Tennessee—the Tennessee law.

Prof. R. C. Minor's whole book is written around this idea of the sovereignty of the law of each state over the particular steps in every transaction that takes place there, especially in the case of contracts—and that so far as the *validity* of contracts is concerned, this is not dependent in general upon the *intention* of the parties or "the law intended by the parties" but on the positive legal regulations of the situs of the particular element of the contract that is under attack. In this case the validity is attacked on grounds connected with the *making* of the contract, not the *performance* of it, and therefore the law of the situs of the making (Tenn.), not of the performance (Va.), should control.

It seems to us therefore with all due respect that the court is mistaken in saying that Prof. R. C. Minor's book is consistent with the *intention* of the parties as the criterion of the controlling law in such cases.

In regard to questions that depend on the intention of the parties, like the *interpretation* of the contract, it seems to us the law the parties intend to govern is the proper law to apply. But the matter of validity is not of that sort. It is a question of positive regulation of the sovereign law and will, not a question as to whether or not the parties *intend* their contract to be valid or to be controlled as to its validity by the law of some other state that has no sovereignty over the particular act in question because that act does not take place there.

Former Associate Editor.

The interesting article sent in by our friend, Mr. T. B. Benson in regard to the war contract adjustment board, published in this number, reminds us that our former associate has now for some months been engaged in the practice of law in Suite 320, Washington Loan and Trust Building, Washington, D. C. Mr. Benson has had a wide experience as a law writer and his work whilst a member of the War Contract Board gave eminent satisfaction. His many friends wish him the eminent success which he deserves and in our judgment, without any question, will obtain.

Note.

In digesting the case of Shiveley's Adm'r *v.* N. & W. Ry. Co., 99 S. E. 647, 5 Va. Law Reg., N. S., 769, the address of Mr. W. C. Franklin of Pamplin, Va., one of the attorneys for the plantiff in error, was erroneously given as Tulsa, Okla. We are glad this was an error as Mr. Franklin is too good a Virginian to lose. In a letter he says: "I have lived in Pamplin the best part of 62 years. I was born here and never have been in 1,000 miles of Tulsa. It may be a glorious place to live but I have no desire to go there. Old Virginia is good enough for me and I don't like to be carried away without my consent."